

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

PAIGE SAGEN,	)	NO. 64917-5-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
DEPARTMENT OF LABOR AND	)	UNPUBLISHED OPINION
INDUSTRIES OF THE STATE OF	)	
WASHINGTON,	)	FILED: July 6, 2010
	)	
<u>Respondent.</u>	)	

Lau, J. — Paige Sagen appeals from a jury verdict affirming the denial of his claim for permanent total disability benefits under Washington’s Industrial Insurance Act, chapter 51 RCW. He argues instructional error because the permanent total disability definition instruction misstates the law. And he challenges several evidentiary rulings. We hold the instruction is not misleading, correctly states the law, and allowed Sagen to argue his case. And because it properly excluded the evidence, we hold the trial court did not abuse its discretion. We affirm the jury verdict judgment.

**FACTS**

On February 19, 1998, Paige Sagen fell off a ladder while working for Sound Overhead Door Service, Inc. (Sound Door). He injured his left shoulder, arm, back, and

neck. The Department of Labor and Industries accepted his claim for workers' compensation benefits. The Department paid him time loss compensation and provided for his medical treatment and vocational counseling for approximately five years.

In February 2002, orthopedic surgeon Dr. Jos Cove diagnosed Sagen with chronic low back pain aggravated by his fall and referred him to Dr. Michael Jarvis at the Tacoma Chronic Pain Management Program. Sagen completed an outpatient pain management program at the clinic on December 9, 2003. At that point, Dr. Jarvis assessed Sagen's physical capacity and concluded he was capable of alternately sitting, standing, and walking for eight hours at a time; lifting up to 30 to 40 pounds; and bending, stooping, squatting, and crouching on an occasional basis.

Department vocational counselor Angela Westling used this physical capacity information to identify a position for Sagen at Sound Door. In consultation with Westling, Sound Door owner Bob Wahl offered Sagen a dispatcher job. He said the job involved mostly phone and paperwork duties, including taking and writing service orders, answering the phone, dispatching service orders, ordering materials, and scheduling. He claimed the position had existed from the beginning of the company, though at times people shared the job. Dr. Jarvis reviewed an analysis of the dispatcher position and concluded Sagen could perform the job with modifications that permitted him to sit, stand, and walk around the work area and use a headphone set. Wahl agreed to make these accommodations and to provide a couch if Sagen needed to lie down. But Sagen did not accept the position.

On June 21, 2004, the Department

issued an order closing his claim and ending time loss benefits as paid through November 23, 2003. The order also stated that no additional permanent disability award was warranted.<sup>1</sup> Sagen appealed to the Board of Industrial Insurance Appeals. Before the industrial appeals judge (IAJ), he argued that the dispatcher job was not a genuine job offer and that his industrial injury rendered him totally and permanently disabled. He presented his own medical and vocational experts and a physical capacity evaluation suggesting he could perform at most sedentary work on a part-time basis.

As evidence that the dispatcher job offer was not genuine, Sagen's vocational expert, John Fontaine, testified that based on the vocational notes from the Department's file, he concluded the dispatcher job was not a bona fide permanent position. He explained that these notes indicated Wahl had told a Department vocational counselor that he believed Sagen was "faking" and that he (Wahl) would do anything to close the claim. Over the Department's hearsay objection, the IAJ admitted the information from the vocational notes under ER 705 to explain the basis for the expert's opinion.

On March 11, 2005, the IAJ issued a proposed decision and order, reversing the Department's order. The IAJ concluded that Sagen was entitled to an additional two weeks of total disability benefits (from November 24, 2003 to December 9, 2003), an additional six months of partial disability benefits (from December 10, 2003 to June 20,

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<sup>1</sup> The Department had previously given Sagen a permanent partial disability award for category 2, permanent dorso-lumbar and/or lumbosacral impairment. See WAC 296-20-280.

2004), and an increased permanent partial disability award (for category 3 rather than category 2 permanent dorso-lumbar and/or lumbosacral impairment as described in WAC 296-20-280).<sup>2</sup> But the IAJ affirmed the Department's determination that Sagen was not permanently totally disabled, finding that the dispatcher job "was consistent with his physical limitations proximately caused by the industrial injury and [that it] did constitute a valid job offer." Sagen filed a petition for review, which the Board denied.

Sagen then appealed to Pierce County Superior Court. The Department renewed its hearsay objection to Fontaine's testimony about the contents of the Department's vocational records. The court struck two questions and answers from his testimony.

After reading the record to the jury pursuant to RCW 51.52.115, the parties submitted proposed jury instructions to the court. Over Sagen's objection, the court gave the Department's modified instruction defining permanent total disability. While based on Washington pattern instruction 155.07, the instruction included three additional sentences specific to Sagen's case. The court also gave Sagen's proposed instruction based on Washington pattern instruction 155.07.01, which instructed that if he was only able to perform "odd jobs," he could still be considered totally disabled.

In closing, Sagen argued that the dispatcher job was only an odd job and that it exceeded his capacity. The Department argued that it was a genuine position that he could perform. The jury returned a verdict in favor of the Department. It found that

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<sup>2</sup> The Department did not appeal from this decision, so these aspects of the order are not at issue here.

Sagen was not permanently totally disabled and that he was capable of maintaining reasonably continuous gainful employment from December 10, 2003 onwards. The trial court entered judgment on this verdict affirming the Board's order. Sagen appeals.

### ANALYSIS

#### Jury Instructions

Sagen challenges instruction 11 defining permanent total disability. He argues the instruction misstates the law. Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and when taken as a whole, properly inform the jury of the applicable law. Judd v. Dep't of Labor & Indus., 63 Wn. App. 471, 476, 820 P.2d 62 (1991). This court reviews challenged instructions de novo to ensure these threshold requirements are satisfied. Hough v. Stockbridge, 152 Wn. App. 328, 342, 216 P.3d 1077 (2009).

RCW 51.08.160 defines permanent total disability as the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." This definition combines several categories of per se total disability with a general standard for determining total disability—the inability to perform any work in any gainful occupation. Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 811, 872 P.2d 507 (1994). But as our Supreme Court acknowledged more than 60 years ago, "courts have found great difficulty in defining what is meant by incapacity to perform any work at any gainful occupation . . . ." Kuhnle v. Dep't of Labor & Indus., 12 Wn.2d 191, 197, 120 P.2d 1003 (1942). It is not necessary for the worker to be "absolutely helpless or physically broken and

wrecked” in order to establish total disability. Kuhnle, 12 Wn.2d at 197. And “sporadic competence, occasional, intermittent, and much limited capacity to earn something somehow, does not reduce what is otherwise total to a partial disability.” Kuhnle, 12 Wn.2d at 197 (quoting Green v. Schmahl, 202 Minn. 254, 256, 278 N.W. 157 (1938)). On the other hand, if the worker can obtain and perform general work, even if it is only light or sedentary in nature, the worker is not totally disabled. Herr v. Dep’t of Labor & Indus., 74 Wn. App. 632, 636, 875 P.2d 11 (1994); Spring v. Dep’t of Labor & Indus., 96 Wn.2d 914, 919, 640 P.2d 1 (1982).

Because the statutory definition alone is insufficient to explain these distinctions, trial courts must supplement the statutory definition with case law when instructing juries. Buell v. Aetna Cas. & Sur. Co., 14 Wn. App. 742, 744, 544 P.2d 759 (1976). “The definition of permanent total disability supplied by case law involves both a medical aspect—the physical impairment itself, and an employability aspect—the impairment’s effect on wage earning capacity.” Young v. Dep’t of Labor & Indus., 81 Wn. App. 123, 130, 913 P.2d 402 (1996). The ultimate measure of disability is the worker’s post-injury wage-earning capacity, which is affected both by medical and vocational factors. Leeper, 123 Wn.2d at 812. And total disability is the loss of all reasonable wage-earning capacity due to an industrial injury. Adams v. Dep’t of Labor & Indus., 128 Wn.2d 224, 235, 905 P.2d 1220 (1995).

To establish a prima facie case of permanent total disability, the worker must produce evidence to show that “he is unable to follow his previous occupation or is no longer able to perform or obtain work suitable to his qualifications and training, and that this incapacity is a result of the industrial

accident.” Allen v. Dep’t of Labor & Indus., 30 Wn. App. 693, 698, 638 P.2d 104 (1981). This includes showing an inability to obtain or perform light or sedentary work that is generally available in the competitive labor market if the work is reasonably continuous and within the claimant’s capabilities, training, and experience. Young, 81 Wn. App. at 131. Once the worker has carried the burden of proving he is unable to obtain and perform such “general work,” the employer can still prevent a finding of total disability under the “odd lot” doctrine by proving the worker can obtain and perform “odd jobs” or “special work” on a reasonably continuous basis. Young, 81 Wn. App. at 131.

Here, the trial court gave the jury two instructions regarding permanent total disability. The Department proposed instruction 11 that generally defines permanent total disability under Washington pattern instruction 155.07 and added three sentences tailored to the facts and issues in Sagen’s case.

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker’s capabilities, training, education, and experience. If Paige Sagen can do any regular work at any gainful occupation, he is not permanently and totally disabled. The work may be light or heavy, sedentary or manual, but it must be some regular employment within his physical and mental capabilities.

A worker is not totally disabled solely because of inability to return to the worker’s former occupation. If Paige Sagen is capable of performing light work of a general nature, then he is not permanently and totally disabled solely because of inability to return to his former occupation.

Total disability does not mean that the worker must have become physically or mentally helpless. Total disability is permanent when it is reasonably probably to continue for the foreseeable future.<sup>[3]</sup>

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<sup>3</sup> Our review of the Department’s cited version of this instruction shows it relied

Instruction 11 (language added to pattern instruction emphasized). Sagen proposed instruction 19A that informed the jury a worker could still be permanently totally disabled if only able to perform “special work” or “odd jobs” intermittently.

If, as a result of an industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the Department shows that odd jobs or special work which he or she can perform is available to the worker on a reasonably continuous basis.

Instruction 19A.

Sagen contends that instruction 11 “was a clear misstatement of the law.”<sup>4</sup>

Appellant’s Br. at 12. Yet he never explains what or how any specific language in the instruction is erroneous.<sup>5</sup> Instead, he emphasizes that the Industrial Insurance Act is a remedial statute that is to be liberally construed, with doubts as to its meaning resolved in favor of the worker. Appellant’s Br. at 8–12. Assuming without deciding this general principle applies to the circumstances here, Sagen raises no doubts over the meaning

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on the following cases to support a modified permanent total disability definition instruction: Kuhnle v. Dep’t of Labor & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942); Fochtman v. Dep’t of Labor & Indus., 7 Wn. App. 286, 499 P.2d 255 (1972); Buell v. Aetna Cas. & Sur. Co., 14 Wn. App. 742, 544 P.2d 759 (1976); Wash. Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986); Herr v. Dep’t of Labor & Indus., 74 Wn. App. 632, 875 P.2d 11 (1994). Sagen does not argue that instruction 11 misstates the holdings in these cases.

<sup>4</sup> At oral argument, Sagen also suggested the instruction was an improper comment on the evidence. But he did not raise this issue below or in his briefing on appeal. We decline to address this issue, as it was raised for the first time at oral argument. Apostolis v. City of Seattle, 101 Wn. App. 300, 306, 3 P.3d 198 (2000).

<sup>5</sup> Indeed, one of the additional sentences appears to come directly from Herr, where the court stated, “An ability to perform light or sedentary work of a general nature precludes a finding of total disability.” Herr, 74 Wn. App. at 636.

of permanent total disability. Indeed, our Supreme Court has approved the Washington pattern instruction defining permanent total disability as a correct statement of the law. See Wash. Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986).<sup>6</sup> Sagen then argues that while the pattern instruction is legally accurate, the trial court erred by supplementing it with additional language. However, trial courts can deviate from pattern instructions so long as the instructions they give correctly state the law and are not misleading. See In re Domingo, 155 Wn.2d 356, 369, 119 P.3d 816 (2005) (noting that pattern instructions are not mandatory). He cites no contrary authority. And, as noted above, Sagen offers no explanation for why the additional language misstates the law.

Nor does Sagen explain how the instruction is misleading. “In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety.” Intalco Aluminum v. Dep’t of Labor & Indus., 66 Wn. App. 644, 663, 833 P.2d 390 (1992). Here, the “odd jobs” instruction that Sagen requested complemented the instruction he challenges. Reading the two together, the jury would have understood that if it agreed with Sagen and concluded that the dispatcher position was simply an “odd job” or “special work” that would not be available to him on a reasonably continuous basis, then he would still be totally permanently disabled. Sagen made precisely this argument to the jury based on the court’s instructions. That the jury rejected this argument does not mean it was confused.

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<sup>6</sup> Sherman addressed an earlier, slightly different version of the instruction. The addition of the phrase “or obtain” was later approved in Leeper.

Because the jury instructions permitted Sagen to argue his theory of the case, were not misleading, and properly explained the applicable law to the jury, his instructional error claim fails.

### Evidentiary Rulings

Next, Sagen contends that the trial court's evidentiary ruling striking portions of Fountaine's testimony as hearsay was erroneous. We review this ruling for an abuse of discretion.<sup>7</sup> Lewis v. Simpson Timber Co., 145 Wn. App. 302, 328, 189 P.3d 178 (2008). An abuse of discretion occurs when the decision is "manifestly unreasonable . . . or based upon untenable grounds or reasons." Burnside v. Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994).

The trial court excluded as hearsay two questions and answers from Fountaine's testimony.

Q: What did you learn with respect to the employer's interpretation of [the] injury?

A: The employer shared with the vocational counselor at that time that he thought that Mr. Sagen was faking his injury and that the employer would do anything to get his claim closed.

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Q: . . . . Mr. Fountaine, with respect to the particular job offer, having reviewed all the information in the vocational history and your contact with the employer, was the job offer in November of 2003 a bona fide permanent

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<sup>7</sup> Sagen incorrectly argues that the superior court reviews the IAJ's evidentiary rulings for an abuse of discretion. When a party appeals a Board decision, the superior court conducts a trial de novo, though one based solely on the evidence presented to the Board. Grimes v. Lakeside Indus., 78 Wn. App. 554, 560, 897 P.2d 431 (1995). RCW 51.52.115. The superior court is the trial court and it "is entitled to independently resolve questions relating to the admission of evidence." Ruff v. Dep't of Labor & Indus., 107 Wn. App. 289, 295, 28 P.3d 1 (2001). Thus, Sagen's argument that the trial court erred because it "did not make any findings that the [IAJ's] rulings were an abuse of discretion" is unpersuasive. Appellant's Br. at 20.

position?

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A: Oh, ah, I mean, to answer that I guess I can tell you that I know from reviewing the file. I know in '99 they didn't have a job of dispatcher. I know that the vocational counselor pulled a dispatcher job from their job bank formulated to fit Mr. Sagen and send it to the employer. They also sent the employer a job offer letter form which they had him put on his letterhead.

The expectations of a job that's offered is for that job to last for a continuous period of time. There wasn't a job then. There's not a job now. And if there was a job in the period of time intervening, it certainly wouldn't have been one that I would have expected to be continuous because it's not there now.

John Fountaine Deposition (Dec. 8, 2004) at 20, 36–37 (objection omitted); Report of Proceedings (Sept. 22, 2008) at 36, 41.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). But under ER 801(d)(2)(i), an admission by a party-opponent is not hearsay if it is offered against a party and is his own statement. Relying on this rule, Sagen argues that the trial court improperly excluded Fountaine’s testimony quoted above recounting the employer’s statements to the vocational counselor. He explains that because the employer is a party to the labor and industries claim, the employer’s statements, as relayed by Fountaine, constitute nonhearsay admissions by a party opponent. But as the Department correctly points out, when there is “hearsay included within hearsay,” there must be an independent basis for admitting each part of a hearsay statement. ER 805. Fountaine’s testimony contained multiple layers of “hearsay within hearsay.” For

example, he testified that he learned from a vocational counselor's notes that Wahl had told the vocational counselor that Wahl believed Sagen was "faking" his injury. The trial court properly excluded this hearsay testimony.

As to Fountaine's testimony about the employer's job offer quoted above, Sagen argues that this testimony constitutes admissible limited evidence offered to explain the basis for his expert opinion. Under ER 703, experts are permitted to base their opinion testimony on facts or data that are not admissible "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." And under ER 705, the trial court has discretion to allow the expert to relate out-of-court

statements to the jury for the limited purpose of explaining the basis of his or her opinion. State v. Lui, 153 Wn. App. 304, 321, 221 P.3d 948 (2009). The trial court may also prohibit or limit the expert's explanation of his or her opinion if, for example, the court determines that it would be misleading, confusing, or unfairly prejudicial. See 5B Karl B. Tegland, Washington Practice: Evidence § 705.4, at 292 (5th ed. 2007). We conclude the trial court acted well within its discretion in excluding Fountaine's testimony.

But even assuming error in excluding the evidence, the error is harmless. Sagen elicited the excluded evidence from other witnesses and relied on this evidence to argue his case. For example, the jury heard Fountaine's testimony that vocational notes indicated Sound Door would "do anything to get the injured worker off L&I," that it was "very unhappy with the injured

worker about his accident,” and that Fontaine would not attempt to place Sagen with Sound Door because there had been “relationship erosion” and “offers of light duty employment from employers are . . . not designed to close cases.” Fontaine deposition (Dec. 8, 2004) at 11, 19, 36. The jury also heard Westling’s testimony that she would be concerned about the working relationship between Sagen and Wahl based on indications that Wahl thought Sagen was faking his injury and would do anything to get his claim closed. Sagen argued, based on this evidence, that Wahl thought he was faking his injuries and only offered him the job so

that his claim would be closed. Under these circumstances, Sagen fails to show the trial court’s evidentiary rulings prejudiced him.

For the forgoing reasons, we affirm the jury verdict judgment.

WE CONCUR:

Cox, J.

Jau, J.

Grosse, J.